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Supreme Court, U.S.
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No. 08 -

In The
SUPREME COURT OF THE UNITED STATES

Christa Marie Labbe, (Agency No.40-136-414)
Petitioner,
vs.
Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

AMENDED APPENDIX

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US DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
York, Pennsylvania

File A40 136 414 January 15, 2004

In The Matter Of

CHRISTA MARIE LABBE,) IN REMOVAL
Respondent) PROCEEDINGS
)

CHARGE: Section 212(a)(2)(A)(i)(I)
APPLICATION: Section 212(c) waiver, deportability, waiver of inadmissibility
ON BEHALF OF RESPONDENT:
Andrew J. Wilson, Esquire
ON BEHALF OF DHS:
Maureen Gaffney, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a 40 year old female native and citizen of Haiti who entered the United States as a legal permanent resident on or about August 13, 1986. On July 21, 2003, the Bureau of Immigration and Customs Enforcement instituted proceedings with the issuance and service of a Notice To Appear. In that Notice to Appear, the respondent was charged with being subject to removal pursuant to the provisions of Section 212(a)(2)(A)(i)(I). This charge was predicated upon her conviction on August 12, 1991 for the crime of first degree manslaughter. On August 20, 2003, the respondent admitted the charges in the Notice to

Appear, and the Court found removability as charged. Removability was established by clear and convincing evidence. See Woodby v. INS , 385 US 276 (1966). The respondent sought relief from removal in the form of Section 212 (c) waiver of removability pursuant to the holding in the United States Supreme Court in St. Cyr.

II. DOCUMENTARY EVIDENCE

The documentary evidence in this case consists of the following.

Exhibit 1, the Notice to Appear.

Exhibit 2, the Department of Homeland Security's notice of intent to offer evidence, Tabs 1 through 3.

Exhibit 3, the Form I-191.

Exhibit 4, EOIR 42-A.

Exhibit 5, frivolous warnings.

Exhibit 6, respondent's supporting documentation.

Exhibit 7, the relevant New York State statutes.

Exhibit 8, September 22, 2003 letter from the respondent's attorney stating that there was no asylum claim.

Exhibit 9, mental heath assessment of the respondent by Dr. Michael Vogel.

Exhibit 10, additional evidence submitted on behalf of the respondent, January 10, 2004.

Exhibit 11, a letter from St. Mary's Hospital in response to a subpoena.

Exhibit 12, a letter from Hudson Valley Hospital in response to a subpoena.

III. SUMMARY OF THE EVIDENCE, OF THE TESTIMONY AND STATEMENT OF THE FACTS

The respondent and her aunt testified in this hearing. The respondent testified that she was born on November 13, 1963 in Beniere, Haiti. She has no children now. She had one child who was born in 1990 on March 9th of that year. The child is now dead.

The respondent testified when asked about the death of her child, that she was depressed after a conversation with her mother and was crying, when the roommate came to the room and found her bed full of blood. Her aunt tried to pick her up. She took her to St. Mary's Hospital, asking her what happened that night. She was taken to the hospital the same day she gave birth to the baby, and the baby the same day. The Baby was born at home. The respondent said she was depressed when they came to her and the baby was dead.

The respondent testified that she doesn't know why she killed the baby. She was told that she killed the baby at home by squeezing the neck of the baby. It was an eight month pregnancy. She stayed under the doctor's care for a long time after going to the hospital. The respondent said that she was raped her last month of high school in 1989. She does not know who raped her, nor did she report the rape to the police. She told a friend about the rape. At that time she was living with her aunt and didn't tell her because of the culture and because she was ashamed. She said she was going to school, because she wanted to be a nun and had wanted to be a nun since the age

of six. She said the rapist grabbed her when she was returning home from school. After the incident she went home, and she said she sat there crying for a long time. As stated previously, she said she did not tell her aunt or anybody about the incident, because she was ashamed.

She said one day after the incident, she was on the bus and heard ladies talking on the bus about pregnancy and about not getting their period. So she then went to the hospital to see a doctor. She didn't tell anyone, because she had no one to tell about the incident. When asked how was she able to conceal her pregnancy, she said no one in the family knew that she was pregnant. Apparently people in the household tended to keep odd hours working and going to school. She didn't see her aunt very much. Although she was sharing a room with her aunt's other niece, the respondent said she always covered herself up when she was around others so that nobody knew that she was pregnant.

The respondent could provide very little actual information about the incident that led to her arrest and conviction. She became quite agitated when asked about the incident. She said that her aunt took her to the hospital the next day, and she was given blood transfusions when she was taken to the hospital. She described her state of mind as dizzy and drowsy. She said she reduced herself to a very small person.

In response to questioning by the Government attorney, she said that an ambulance came to the house, because the other niece saw her lying in pool

of blood in her bed and called the ambulance. In any event, the respondent was taken to the hospital, and according to the respondent, she was given transfusions and place in intensive care. She was very sick at the time. She was asked about the baby, and the medical personnel told her that the baby was dead. She was kept at the hospital from the 9th through the 13th, and her cousin picked her up. Charges were brought against her for the death of her baby on June 20, 1990. She was in jail for a while, andthen on August of 1990 was sent to a mental health facility for 90 days and then to another center for perhaps six months. She served three years and a few months in the New York State prison system. She was at Bedford Hills in Albion. She said while she was there she took classes and saw a doctor there. She took classes in parenting, family violence and earned lots of certificates in things such as cosmetology, hospice care, and life skills. One of the conditions, she said, of her parole was that any time she was depressed, she had to go see to a doctor.

She said that she has been going to school, and she attended a lot of classes while in prison, and was going to school once she got out of prison. She also says that she attends church and goes to church to pray. She would like to continue going to school and get a degree in human services. She described her earnings a variable. She has been working as a home health aide. She said she had four brothers, one of whom recently died, which is apparently why she had returned to Haiti; and two sisters, one of whom has disappeared. She has siblings living in Haiti. She is the

main support of her siblings.

Since 1986 she has lived the majority of the time with her aunt and uncle, when she has not been incarcerated. She said that ifshe returned to Haiti, they would kill her after the death of her brother. She went back once because of sickness and death in the family. Her mother had a house that she left to Christa and her brother. She said that people might want to kill her for the house. She doesn't think she would do anything in Haiti, because it's not easy to get a job.

She has successfully completed her probation. She has no arrests and no convictions. She expressed remorse or her actions.

The Respondent's aunt, Otiana Lafortune, also testified in the respondent's behalf. Her aunt said that she lives in Brooklyn. She is married. She lives with her husband, who is 84 years old. She said that the respondent is her niece, the daughter of her sister. The respondent came to the United States in 1986 and has been living with them ever since. The aunt testified that she was not aware that her niece was ever pregnant. She has another niece who was living with her when Christa was pregnant, and they shared the same room. Nobody knew, she reiterated, in the family that the respondent was pregnant. She said the respondent was attending school in Manhattan and that she was working. She said the respondent was the one who worked to help the resp of her siblings in Haiti.

She said the morning of the incident, she was on her way to work when the respondent said she didn't fee very good and asked for the witness to take her

to the hospital. The aunt said she took the respondent to the hospital but didn't stay with her. Subsequently, a baby was found in the house. The police came. The respondent was kept in the hospital for a few days. Then she was released. The aunt testified that she rented a room for her niece nearby, because she thought it would be better, because everyone was talking about the situation, and there was a lot of criticism and a lot of attention.

The respondent, she testified was questioned by the police. She does not know if there was ever any autopsy done on the baby. She said the other niece, who was sharing a room with the respondent, didn't know anything about the pregnancy and simply woke up and saw blood in the bed. She doesn't know if there was ever any newspaper stories about the death of the baby. She said that when the respondent was in prison, she would go upstate to visit her. She said after the respondent was released, social workers used to come to see her. She doesn't know if the respondent went to see a psychologist or psychiatrist herself. She said that the respondent went back to work and went back to school after her release. She has not been in trouble since then. She said that the respondent goes to church regularly, but she doesn't really know what church she goes to, although the aunt said that she herself is Seventh Day Adventist, and that her pastor used to call and talk to the respondent on the phone.

IV. SECTION 212(c) WAIVER

STATEMENT OF THE LAW

Section 212 (c) of the Immigration and

Nationality Act provided in pertinent part that an alien lawfully admitted for residence, who temporarily proceed abroad voluntarily and not under an order of deportation , and who in returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General without regard to certain specific grounds of exclusion in Matter of Silva, 69 I&N Dec. (BIA 1976). The Board of Immigration Appeals adopted the reasoning of the United States Court of Appeals for the 2nd Circuit in Francis v. INS, 532 F.2d 268 (2nd Cir. 1976), holding that lawful permanent resident is prima facie eligible to apply for relief from deportation, even if she has not proceeded abroad subsequent to the act which rendered him or her deportable. The Board extended the availability of Section 212(c) relief to eligible aliens in deportation proceedings, for whom a comparable ground of excludability exists. See Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990). In 1990, Congress amended Section 212(c) to restrict the availability of this form of relief to any alien who has been convicted of one or more felonies and served a term of imprisonment of at least five years. In Scheidemann v. INS, 83 F.3d 1517 (3rd Cir. 1996), the 3rd Circuit held that this five year bar applied to post enactment convictions. Although eligibility to apply for Section 212(c) was limited by the passage of the Anti-Terrorism and Effect Death Penalty Act, the Supreme Court held in INS v. St. Cyr, 121 US 2271 (2001) that Section 212 (c) relief remained available for

those aliens whose convictions were obtained by plea agreement and who would have been eligible for Section 212 (c) relief at the time they entered a plea. To be eligible for Section 212(c) relief, a respondent has the burden of demonstrating that he was admitted to the United States as a permanent resident, that he has seven years continuous residence in the United States, and that he merits a favorable exercise of discretion. A favorable exercise of discretion in a particular case involves the balancing of the positive social and humane considerations in favor of a waiver against the adverse factors evidencing the respondent's undesirability as a permanent resident. Matter of Marin, 16 I&N Dec. 578, 584 (BIA 1978) Positive considerations include such things as family ties within the United States, lengthy residence in the United States, which includes when the residence began at a young age, evidence of hardship to the respondent or his family if deportation occurs, service in the armed forces, a history of employment, strong property and community ties, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the respondent's good moral character.

A section 212(c) applicant with a criminal record will ordinarily be required to demonstrate evidence of rehabilitation before a favorable exercise of discretion. Rehabilitation is a significant discretionary factor in these instances. See Matter of Roberts, 29 I&N Dec. 294 (BIA 1991). See also Matter of Arreguin, 21 I&N Dec. 38 (BIA 1995). Adverse factors include the

nature and underlying circumstances of the exclusion or deportation grounds at issue, evidence of significant violations of the nation's immigration laws and the existence of a criminal record. Moreover, one or more of these adverse factors may be ultimately determinative of whether 212(c) relief is usually granted in a particular case. Matter of Marin, supra. The demonstration of unusual or countervailing equities does not mandate the favorable exercise of discretion. Rather, absent such equities, relief will not be granted in the exercise of discretion. Matter of Buscemi, 19 I&N Dec. 628 (BIA 1998).

The Attorney General in Matter of Jean , 23 I&N Dec. 373 (A.G. 2002) addressing an issue involving a Section 601 waiver, which was necessary to allow an individual to adjust her status from refugee to lawful permanent residence, the Attorney General noted that aliens who have committed violent or dangerous crimes will not be granted a discretionary waiver to permit their adjustment of status. The Attorney General goes on to say at page 383 of this decisioon that in my judgment, that is to say his judgment, the balance will nearly always require the denial of a request for a discretionary relief from removal where an alien's criminal conduct is as serious as that of the respondent. It should be noted that Mrs. Jean had been convicted of recklessly shaking a child in her care, so that the child subsequently died. The Attorney General stated that it would not be a prudent exercise of the discretion afforded me, that is to say the Attorney General, to grant favorable adjustments of status to

violent or dangerous individuals, except in extraordinary circumstances, such as those involving national security or foreign policy considerations or cases in which an alien clearly demonstrates that the denial of status adjustment would result in exceptional and extremely unusual hardship.

In the instant case, the Court finds that the respondent was lawfully admitted for permanent residence for the requisite number of years; that she was convicted by virtue of a plea; that she served less than five years; that the date of the plea was June 21, 1991. In terms of the Marin factors, the Court finds that the United States has been in the United States for 17 years. While she has family members here, her closest family member here is that of her aunt, whom she describes as being like a surrogate mother. The respondent appears to have worked fairly consistently in the United States. Her criminal history is the one mentioned charge, the conviction of manslaughter for the death of her child. Her behavior in prison has apparently been excellent. The hardship to family members in the United States should she be removed appears to be somewhat limited. Her present lifestyle, she apparently prior to being apprehended is working and going to school. She has siblings in Haiti that she has seen and apparently has a good relationship with. Respondent's health appears good. She does not appear to own a significant amount of property. Her community activities, according to her, largely consist of her membership in the church. The respondent has established a clear record of rehabilitation. The

problem of course, is that the respondent's crime is of manslaughter involving an infant is one which is regarded as particularly heinous.

In order for a favorable exercise of discretion, the respondent would have the burden of establishing that the circumstances of the offense were such, or that her state of mind was such that there were unusual circumstances that led to her arrest and conviction. The court cannnot exercise its discretion absent the ability to find extraordinary circumstances surrounding her conviction.

In this instance, the respondent does, it is true, have substantial equities in the United States. However, she has failed to establish the necessary unusual or countervailing equities that would be necessary for a Section 212(c) grant. It should be noted that this Court continued this case a number of times and directed respondent's counsel to see about getting additional information that would help in the adjudication of this case. This Court is sympathetic to the respondent. The respondent certainly seems to be fully rehabilitated. However, the Court cannot, and while there are significant questions about the conviction, there is no evidence about the background of the conviction. The testimony of the aunt was of a limited utility in trying to shed light on the conviction. The respondent herself cannot discuss the nature and circumstances of the offense, thereby leaving the court no other option but simply to look at the words on the conviction document, manslaughter, and manslaughter of the infant. This is insufficient to raise this evidence

that would allow the Court to make any kind of finding of unusual and extraordinary circumstances are present.

In adjudicating any application for a waiver such as this, the Court may look behind the record of the conviction to look at the circumstances surrounding the conviction. However, the Court has been provided absolutely no information about the circumstances surrounding the conviction. The Court cannot create out of whole cloth the circumstances surrounding the conviction. The Court cannot infer from silence the circumstances surrounding a conviction. Accordingly, although the Court is quiet sympathetic to the respondent and does believe that she has evidenced full rehabilitation, that in and of itself is insufficient for a grant of this waiver, given the nature of her conviction. There is no evidence that she was raped, for example. There is no evidence of her state of mind. There is no evidence about the nature and substance of the offense itself. Accordingly, the Court has no option but to deny the respondent's request for a 212 (c) waiver and to order that she be removed to her home country of Haiti. Done and ordered. Accordingly, the following orders are entered.

ORDER

IT IS ORDERED that the respondent be and is found removable pursuant to Section 212(a)(2)(A)(i)(I).

IT IS FURTHER ORDERED that the respondent's application for a Section 212(c) waiver be and the same is hereby denied.

A 40 136 414 January 15, 2004

IT IS FURTHER ORDERED that she be removed to her home country of Haiti.

Done and ordered this 15th day of January 2004.

Grace A. Sease
Immigration Judge